IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.479 OF 1991

Pandurang Shripat Kanse,
an adult, Indian Inhabitant,
Occ: Agriculturist,
res. at Nahavi,
Taluka: Indapur,
Dist: Pune ..Appellant

versus

1. Motichand C. Shah (since deceased)
   through legal heirs
   a) Chanchala Motichand Shah,
      aged 55 years,
      Occ: Agriculturist.

   b) Jyoti V. Shah
      Occ: Household,
      both residing at Palasdeo,
      Tal : Indapur,
      Dist: PUne.

2. Jawahar Ramnik Shah,
   Occ: Busienss.

3. Nana Chabu Bansode,
   Occ: Agriculturist,

4. Kashinath Baba Bansode,
   Occ: Agriculturst,
   all resident of Palasdeo,
   Tal: Indapur,
   Dist: Pune.

5. Nirutti Bala Bansode,
   Occ: Agriculturist,
   res. at Palasdeo,
   Tal : Indapur,
   Dist: Pune ..Respondents

Mr. P.J.Shinde for the Appellant.

Mr. Prafulla Shah for the Respondent

Coram : S.R.Sathe, J.
Dated : 20th Feb., 2006

JUDGMENT

1. Appellant the Original plaintiff in Regular Civil Suit No. 78 of 1976 has preferred this appeal against the judgment and order passed by the Court of Additional District Judge, Baramati, Dist: Pune, whereby the order passed by the trial court dismissing the plaintiff's suit for possession of the suit property was confirmed and appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :

. The land bearing survey no.129/A/1 admeasuring about 20 acres 38 gunthas situated at Village Nhavi, Tal: Indapur, as owned by the Plaintiff. According to the plaintiff, in the year 1965 or thereabout he was suffering from Tuberculosis, as such he was in need of money. He, therefore, obtained hand loan of Rs.1000/- from the defendant No.1 on 16.6.1965. 5-6 days thereafter

the plaintiff was again in need of Rs.1000/- hence he demanded the said amount from defendant No.1. Defendant No.1 agreed to advance the amount accordingly, but asked the plaintiff to execute the deed of mortgage of the suit property as a security for the amount advanced. The plaintiff, the defendant no.1 and some other persons therefore went to the Sub-Registrar Office, Indapur. As the defendant No.1 was not a agriculturist, the document was executed in the name of Defendant No.2. Thus, on 24.6.1965 the sale deed was executed as a security for the amount advanced. Besides this, as at the relevant time there was prohibition of money lending transaction it was decided to execute the sale deed in favour of defendant No.2. No interest was to be charged for the said amount and the defendant No.1 was to cultivate the land and take income out of the same in lieu of interest. It was agreed between the plaintiff and the defendant to reconvey the property on plaintiff repaying the amount.

3. Sometime, in the year 1976, plaintiff came to know that defendant Nos.1 and 2 are trying to sell the said land to defendant Nos.3 to 5. He,

therefore, issued notice dated 11.4,1976 in Daily Prabhat stating therein that no one should purchase the land as he is the owner and the same is mortgaged with defendant no.2. Even then, the defendant Nos.3 to 5 decided to purchase the land from the defendants 1 and 2 and accordingly executed agreement of sale. The plaintiff, therefore, filed the present suit for redemption of mortgage of the transaction. He also prayed for declaration that the agreement to sale executed between defendant Nos.1 and 2 and defendant Nos.3 to 5 is not binding on him.

4. During the pendency of the suit the original defendant no.1 died and his heirs were brought on record.

5. The original defendant no.2 and 3 filed their joint written statement at exhibit 25 and opposed the suit claim. They contended that the plaintiff has falsely alleged that the transaction dated 24.6.1965 was in the nature of mortgage. The defendants also denied the allegation that they had agreed to reconvey the suit land to plaintiff. According to them there was no question of any such

agreement because the transaction was of sale out and out and it was not of money lending transaction as alleged by the plaintiff.

6. The defendants further contended that right from the sale deed dated 24.6.1965 the defendant No.2 was in actual possession of the suit land. During the period of 11 years the plaintiff did not raise any objection and submit that the transaction was of money lending and it was only when the defendant No.2 sold the suit property in favour of defendant No.3, the plaintiff has filed the present suit. The defendant, therefore, contended that the suit is barred by law of limitation. They also contended that plaintiff has not sought declaration that the sale deed executed in favour of defendant no.3 is void. As admittedly, the land is in possession of the defendant No.3 plaintiff is not entitled to get any relief.

7. On these pleadings the learned trial Judge framed issues. In order to prove the suit claim, plaintiff examined himself and other two witnesses. As against this the defendant No.2 examined himself at Exhibit 105 and defendant No.3 examined himself

at Exhibit 10 and witness Krishna Bhau Ghodke at Exhibit 111. Both the parties produced certain documents.

8. After considering the evidence adduced by both the parties, the learned trial judge came to the conclusion that the transaction dated 24.6.1965 was of sale and the plaintiff failed to prove that the suit land was mortgaged to defendant Nos.1 or 2. He, therefore, dismissed the plaintiffs suit.

9. Being aggrieved by the said order, the original plaintiff filed Civil Appeal No.3/B/1989 in the Court of Addl. District Judge, Baramati. After hearing the arguments advanced by both the sides the learned Addl. District Judge, Baramati also came to the conclusion that the plaintiff has failed to prove the suit claim. Naturally, he dismissed the appeal.

10. Being aggrieved by the said order, the original plaintiff has filed the present appeal. While admitting the said appeal, this Court (Coram: P.S.Patankar, J.) passed following Order on 15.10.1991. "Admit. Substantial Question of law as

in ground nos.3, 4, 7, 8, 11 and 15"

The said grounds read as follows:

> iii) The learned Judge has committed error of appreciating the evidence establishing the contention of the Appellant htat the transaction dated 24th June, 1965 was a sham and colourable document of sale inspite of the material on record that after the said alleged transaction the Respondent No.2 had allegedly advanced the sum of Rs.6000/- to the Appellant on 28th April, 1968 and after filing the suit allegedly paid by Respondent No.3 to 5 to Respondent No.2 when they purchased the suit land from the Respondent No.2 on 31st August, 1976.
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> iv) The learned Judge failed to appreciate that the amount of consideration of Rs.2000/- allegedly paid by the Respondent No.2 in respect of the suit land admeasuring about 8(Eight) Hector and 91R (about 22 Acres) is insufficient and no person of ordinary prudence would have sold the land to such low price and that the said sale is hit by the insufficient and inadequate consideration allegedly paid by the Respondent No.2 to the Appellant.
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> vii) The learned Judge failed to appreciate that provisions of Section 58(c) of the Transfer of Property Act read together with the provisions of Section 91 and 92 of the Evidence Act, the separate oral agreement restricting the rights sought to bbe conveyed by any deed of sale can be proved by oral evidence.
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> viii) The learned Judge failed to appreciate that by mere agreement no rights can be surrendered or relinquished in favour of any person in respect of immovable property and therefore the alleged surrender of rights by the Appellant in favour of the Respondent No.2 by writing dated 17th May,

1986, was not admissible in evidence.

xi) The learned Judge ought to have held that inspite no specific mention in the deed of sale dated 24th June, 1965 the re-conveyance of the property of the Appellant, the Appellant was entitled to prove the oral agreement by oral evidence and such oral evidence is acceptable and the documents dated 17th May, 1976 clearly establishes that there was a mere agreement of giving in security the suit property to the Respondent No.2 at the instance of the respondent No.1 for a small amount of Rs.2000/-, advanced as a loan.

11. At the outset it must be mentioned that though the various substantial questions of law have been framed in the present matter, Shri P.G.Shinde, learned Advocate for the original plaintiff mainly argued only two points. Firstly, he submitted that bare reading of the sale deed would got to show that the real transaction must not be of sale because land admeasuring about 18 acres have been sold by parting amount of Rs.2000/-. He, therefore, argued before me that the consideration mentioned in the same deed is grossly inadequate and as such transaction be held to be that of mortgage. Secondly, he canvassed before me that plaintiff is a poor person, and as he was in need of money he executed the document in favour of the defendant No.2. According to him, the transaction was in fact with defendant No.1, but as the defendant No.1 was

not agriculturist, the document was executed in favour of defendant No.2. He, therefore, submitted that the appeal be allowed and the defendants be directed to accept the amount of Rs.2000/- and execute the sale deed of the suit land in favour of plaintiff. As against this, Shri P.B.Shah learned Advocate for the defendants supported the judgment and order passed by the learned trial Courts and the first Appellate Court. He submitted that there is in fact no substantial question to law involved in the present suit and mere inadequacy of consideration cannot be sufficient cause to set aside the sale deed and hold that the transaction was of a different nature. According to him this also cannot be done in view of the provisions of Section 92 of the Evidence Act.

12. It is not in dispute that the suit land was initially held by the plaintiff. It is the plaintiffs case that he was suffering from tuberculosis and as such he obtained loan of Rs.1000/- from defendant No.1. Then again after few days he asked for additional amount of Rs.1000/- and at that time the defendant No.1 asked him to execute the document of plaintiffs land by way of security.

It is the plaintiffs case that as defendant No.1 was not having money lending license and was also not agriculturist, he asked the plaintiff to execute the sale deed in the name of the defendant No.2. Thus, according to plaintiff, defendant No.2 is in fact benamidar. Naturally, we have to see whether plaintiff has adduced sufficient evidence to substantiate his case.

13. The plaintiff has examined himself and stated as per the averments in the plaint. As the two witnesses of plaintiff are contradicting each other, from their evidence it cannot be said that they were fully aware about the transaction that took place between the plaintiff and defendant No.1 or 2. It seems that they have merely signed the document as witness. From the evidence of plaintiff and his witness it is very clear that they have also failed to adduce any cogent and convincing evidence to show that the defendant No.1 was in fact doing money lending transaction. On the contrary, it has come on record that even at the time when the sale deed of the suit property was executed the defendant No.1 was in fact holding some land. So, the plaintiffs theory that as defendant No.1 is not

agriculturist the sale deed was executed in favour of defendant No.2 is rightly rejected by the courts below.

14. It must be noted that the plaintiff is not consistent in his stand. At one stage he has alleged that the transaction was of money lending. Question arises, if it was not, why the defendant No.1 did not obtain any writing from the plaintiff when according to plaintiff he had earlier taken loan of Rs.1000/- from defendant No.1. Besides this, if really the intention of the parties was to execute the document of mortgage, there was no bar for executing such document. The plaintiff has at the other stage stated that they executed the sale deed, but at that very time they had entered into oral agreement as a result of which it was agreed that the defendant No.2 would reconvey the land on receipt of payment. If really it was so, then there was no hurdle in getting such agreement executed, but that has also not happened. So, taking into consideration these facts, and the well settled position of law as per the provisions of Section 58(C) of Transfer of property Act and its proviso, both the courts below have rightly held that the

transaction in question cannot be called a mortgage, but it is sale out and out.

15. Incidently, it must be noted that the sale deed in question has been acted upon. Immediately, after the execution of the sale deed the defendant No.2 got his name entered in the record of rights in respect of the suit land. Admittedly, since that date the defendant No.2 was cultivating the land and taking income out of the same. There is nothing on record to show that during the period of 11 years the plaintiff had raised no objection or had made no attempt to pay the amount taken by him by way of loan and get the land reconveyed. So, this conduct of the plaintiff is also quite eloquent to suggest that he must have sold the suit land to defendant No.2 and knowing fully well the said position, he kept mum during the period of 11 years.

16. It is true that if we only see the area of the land and the price paid for the same, then it appears to be inadequate. It must be mentioned that the transaction has taken place on 24.6.1965. At that time the prices of agricultural land were very low. Besides this, there is no specific evidence

adduced by the party to show as to what was the quality of the land, what was the annual income he was getting from the same. What were the added advantages to the land in question. When the party has failed to adduce any specific evidence in that behalf then it is also very difficult to hold that the consideration given by the plaintiff was grossly inadequate. Besides this, even if we assume for the sake of argument that it was so, then we must also take into consideration the fact that at the relevant time the defendant must be in absolute need of money and as a result of the same he might have agreed to sale his property for low price. But now, after 11 years, the plaintiff has tried to show that the land has been taken by the defendant for meagre amount. That is obviously because that since the year 1975 or thereabout there has been considerable appreciation in the price of the land. So, it is only when the defendant No.2 decided to sell the land to defendant No.3, the plaintiff has rushed to the Court.

17. It is an admitted fact that the defendant No.3 has purchased the suit land vide Exhibit 78 in the year 1976 for Rs.15,000/-. So, if we consider

this price then also it is very difficult to hold that in 65 the amount paid was grossly inadequate.

18. Both the courts below, after considering the entire evidence have recorded the finding of fact that the suit land was sold by plaintiff to defendant No.2 by registered sale deed and the transaction was of sale out and out. There is no reason to interfere with the said finding. By no stretch of imagination it can be said that the appreciation of evidence is perverse or that the courts below have not taken into consideration the relevant provisions of law.

19. In this view of the matter, there is no substance in this appeal. Hence, I pass the following order:

ORDER

. Appeal is dismissed with cost.

(S.R.Sathe, J.)